**California Commission**
**on**
**Health and Safety and Workers' Compensation**

# MINUTES OF MEETING

Meeting Day and Date: Thursday, January 18, 1996

Meeting Location: State Building
107 South Broadway
First Floor Auditorium, Room 1138
Los Angeles, California

Commission Members Present:

Incoming Chairman Tom Rankin
Outgoing Chairman Robert B. Steinberg
Commissioner James J. Hlawek
Commissioner Leonard McLeod
Commissioner Gerald O'Hara
Commissioner Kristen Schwenkmeyer
Commissioner Gregory Vach

Commission Members Absent:

None

Commission staff:

Christine Baker, Executive Officer of the Commission

*Welcome*

The meeting was called to order at 10:00 am by Chairman Robert B. Steinberg.

*Adoption of Minutes*

Chairman Steinberg asked for a motion regarding the minutes of the Commission meeting on November 9, 1995, which had been submitted for approval by Christine Baker. Commissioner Hlawek moved that the minutes be adopted, Commissioner McLeod seconded the motion, and the motion passed unanimously.

*Election of the 1996 Commission Chairman*

Chairman Steinberg opened the floor to nominations for Commission Chairman. Pursuant to California Labor Code Section 75(b), the Commission is to select one of its members representing organized labor to chair the Commission for a one-year term in 1996.

Commissioner McLeod was nominated by Commissioner Hlawek and Commissioner Vach seconded the nomination. Commissioner Rankin was nominated by Commissioner O'Hara and Commissioner Schwenkmeyer seconded the nomination.

Commissioners Hlawek and Vach voted for Commissioner McLeod. Commissioners McLeod, O'Hara, Rankin, Steinberg, and Schwenkmeyer voted for Commissioner Rankin. (Commissioner Alvarado did not arrive at the meeting until after the voting.)

Commissioner Tom Rankin was elected the Chairman of the Commission for 1996.

*Fact Finding Hearing on Permanent Disability*

Commissioner Steinberg announced that he would be chairing the Fact Finding Hearing on Permanent Disability. He informed the attendees that the purpose of the hearing was to bring representatives of the various interests in the workers' compensation community together, identify problems in the current permanent disability system, and propose new solutions to remedy perceived failings in the system. Commissioner Steinberg also indicated that the Commission was considering initiating a study of permanent disability.

In preparation for this hearing, the Commission requested that interested members of the workers' compensation community submit written testimony and/or register to give oral testimony at this meeting.

Commissioner Steinberg called upon Casey L. Young, Administrative Director of the California Division of Workers' Compensation, to give the initial presentation.

*Division of Workers' Compensation - Casey L. Young, Administrative Director*

DWC Administrative Director Casey L. Young stated that he was attending the hearing mainly to hear others' comments about the permanent disability system and about the Permanent Disability Rating Schedule (PDRS) in particular. He said that he would also appreciate comments from the community on whether they thought that DWC should go ahead with the adoption of the proposed changes to the PDRS that DWC has developed at this point in time or wait for the completion of the work in the Commission's project which may lead to a more comprehensive change in the PDRS.

Mr. Young reiterated what he stated at the Commission's November 1995 meeting in Sacramento; he would like DWC to join arm in arm with the Commission to create a better permanent disability schedule and system. He urged the Commission to proceed with a focused study to provide the necessary information to achieve two specific goals in the permanent disability system: greater consistency among the ratings and more efficient administration.

Mr. Young said that about ten years ago when he worked in the Legislature he had an opportunity to study the permanent disability system and he feels that the current system is a "very tortured stepchild of what the founding fathers of the system created." He believes that there is no better model for a permanent disability system than the one originally created in California and recommended that the Commission not spend much time on developing a model system. He said that the Commission would have to convince the Legislature "to change this system in a very radical kind of way" and that he thought such legislation would not pass.

Mr. Young urged the Commission to focus on achieving more consistency and efficiency in the determination in the amount of benefit and the delivery of the benefit. In particular, he recommended the Commission study the role of the physician and how an injured worker's condition is evaluated and what the DWC disability evaluators do with the information coming from the physician.

Mr. Young expressed his opinion that physicians ought to be kept in a role that is familiar to them -- determining "impairment" as opposed to "disability" pursuant

to the PDRS. Then the state should develop a schedule that takes the pure medical information and translates it into a disability rating, using very clear, verifiable, objective information. He also suggested incorporating pain into the ratings.

Mr. Young said that state government, including DWC, needs to find ways to do the job with fewer resources. Clearer standards would lead to less litigation and thus a reduction in workload for the division.

Commissioner Rankin asked Mr. Young how he would go back to the old system. Mr. Young stated that the best way would be to throw out the Packet Thurber's Industrial Disability of 1960 and take a look at the American Medical Association (AMA) Guides. The AMA guides would give the physician better guidance as to how they ought to report injuries. He said that he was not suggesting that the AMA guides be used as a disability schedule. He recommended a project to create a schedule that takes the information derived from the AMA guides and translates into a disability rating.

Commissioner Vach asked Mr. Young if he felt there may be resistance in the division if the Commission and DWC were to work together on a project that may result in downsizing. Mr. Young replied that there was no reason for resistance. If the project resulted in reduced litigation, there was other work for disability evaluators and judges to do.

Commissioner Steinberg asked Mr. Young to clarify the difference in the original and in the current permanent disability systems. Mr. Young explained that originally an injured worker with a permanent disability would receive disability payments - four weeks per percent of disability - regardless of when they returned to work. There would be an incentive on the worker's part to return to work as quickly as possible. Now, there are separate benefits - temporary disability and permanent disability. An injured worker receives temporary disability payments until the point where he or she is determined to be "permanent and stationary", and then receives permanent disability payments whether or not the injured worker returns to work. Permanent disability payments have a lower weekly maximum than temporary disability payments, so there is an incentive for the injured worker to push the "p&s" date back and an incentive for the employer to push it forward. This has created a friction point in the current system which leads to litigation.

Commissioner Steinberg asked if Mr. Young had ever given thought to a wage loss system whereby the injured worker receives payments for the entire period of the injured worker's disabled life. Mr. Young replied that there are some good incentives in such a system; it encourages the employer to bring the injured worker back to work because the employer will save disability benefits and it is equitable

because the injured worker receives disability payments that match the wage loss. However, Mr. Young said there were serious downsides to a wage loss system, particularly in its administration; the file would have to be kept open forever, the administrator would have to insure that the benefits are paid when the wage loss occurred and would have to determine how much of the wage loss was attributable to the injury and how much was attributable to something else. There would be a whole new set of factors to fight about. Mr. Young concluded that, on balance, a system like the one California currently has is preferable. It is more efficient administratively, gets injured workers in and out quickly and provides them with an amount of money they understand and with as little dispute as possible.

Chairman Rankin asked what prompted the change in the system to have separate temporary and permanent disability benefits. Mr. Young replied that he believed that it was labor pushing for more benefits.

Commissioner Steinberg thanked Mr. Young for his testimony and called upon John Frailing, president of the California Applicants' Attorneys Association.

*California Applicants' Attorneys Association - John Frailing, President (Part I)*

Mr. Frailing began his testimony by stating that the California model for permanent disability has some very good parts to it and it would be a mistake to discard it in total. He said that this system allows for the effects of the injury on the competitiveness in the workplace and deals with personal limitations. When he is in front of a workers' compensation judge or disability evaluator, they are discussing the limitations of the injured worker in his or her next employment in the system. So if an injured worker has a limitation from heavy lifting, they are looking at what effect will that limitation have on the injured worker's ability to compete for other jobs in the state of California.

Mr. Frailing said that the kinds of jobs have changed significantly since 1951, the year that the PDRS was last revised. He noted that the percentage of back injuries is essentially the same now as then and that the other injuries have not changed much except for an increase in hand and wrist injuries.

Mr. Frailing stated that in the current system, the physicians are asked to evaluate the objective factors of disability, the subjective factors of disability, and work preclusions and restrictions. The restriction takes into consideration what the injured worker cannot do and what he or she should be restricted from doing to prevent further injury.

He noted that DWC Administrative Director Casey L. Young talked about the issue of predictability. Mr. Frailing expressed the opinion that predictability could be looked at in many different ways. In the current system, it is not unusual for example to have ratings of a 10 percent disability and a 30 percent disability on the same injured worker. On the face of it, the system is not predictable, but predictability is how one looks at it. Because of the 1990 and 1993 reform legislation, which encourages the use of agreed medical examiners, there is less conflict among the reports. Also, because this is an adversarial system, the adversarial relationship between the insurer and the injured worker usually creates a balance between those reports. Mr. Frailing believes that probably over 85 percent of the time, cases which have conflicting medical reports are settled by the parties by splitting the difference in the permanent disability ratings.

However, Mr. Frailing pointed out that difficulties arise when there are disability factors which are not clearly recognizable by the parties and when there are multiple and perhaps overlapping disabilities. He said that multiple disabilities cause a lot of work for all the people in the system and they give not certainty to the players who are involved in the system. It would help to have such things included in the PDRS.

Mr. Frailing introduced Daniel A. Capen, M.D., an orthopedist, to discuss objective and subjective factors of disability.

*California Applicants' Attorneys Association - Daniel A. Capen, M.D.*

Dr. Capen said that he has been involved in teaching at the University of Southern California Medical Center for the last 15 years in addition to treating injured workers.

Dr. Capen stated that what the patient says is eighty percent of the information that the physician is going to use to determine what is wrong and how to deal with it. The physical exam is another ten percent and sophisticated tests contribute an additional eight to ten percent. As a treating and evaluating physician, he believes that if what the patient says is eliminated, one would be doing veterinary medicine.

Dr. Capen noted that in the 1990's with American medicine in the nonwork setting, many medical decisions in the HMOs have been relegated to nonmedical personnel. The newspapers contain examples of patients not getting appropriate care because of external forces and he cautioned against that in the workers' compensation system.

Dr. Capen says that he sees many patients with overuse syndrome of the extremities, especially carpal tunnel syndrome and rotator cuff impingement. Conditions such

as these do not always show up on medical tests. An EMG or MRI with a negative result does not always mean that an injured worker does not have carpal tunnel syndrome or rotator cuff impingement.

Dr. Capen introduced Rita Ann Murray, a patient with carpal tunnel syndrome who had tested negative on an EMG.

*California Applicants' Attorneys Association - Rita Ann Murray, injured worker*

Ms. Murray said that she was injured at work in April 1993. She was referred to a physician, her hand was cast but her symptoms did not clear up. In September 1993 she went to another physician who diagnosed carpal tunnel syndrome and said that she needed surgery. However, because of a negative EMG, the authorization for such surgery was denied under workers' compensation. Her hands were getting worse -- her fingers were numb, she had no grasp, and could not do her regular household duties. She retained an attorney who sent her to another physician who performed carpal tunnel decompression surgery in March 1995. Ms. Murray feels that she is ninety percent recovered and is not experiencing the symptoms she had before. Eventually, the surgery was covered by workers' compensation and she settled in September 1995.

Dr. Capen said that this experience speaks to the difficulty of making a system that is fair, yet not making rules that are so concrete that they exclude people like Ms. Murray from not only appropriate care but from receiving compensation for an injury.

Commissioner Vach said it seemed to him that the patient history is less important that findings derived from orthopedic tests or work performance evaluation. Dr. Capen replied that it would be impossible to evaluate someone's functional capacity appropriately without taking into account the pain that person is in when performing those tasks. Anyone who is measured in terms of their ability to perform something is going to be impaired if he or she hurts while performing the task. Commissioner Vach asked if there were a situation where the physician recommends a work restriction but the person returned to the job, would there be a disability? Dr. Capen responded that in that particular circumstance, if the employee were performing for an extended period of time, it should be reconsidered. He thought there should be a category for that.

Commissioner Steinberg asked Dr. Capen, as a physician who rates patients, if he perceived the same problems with the permanent disability system as Mr. Young. Dr. Capen replied that it was difficult to look at a book that factors in age and occupation and translate what he may say in terms of "do's and don'ts" into a

percentage disability. The only other system that he has had experience with is the AMA guidelines. Dr. Capen believes that the AMA guides have a vast shortcoming in terms of factoring in pain and loss of function.

Mr. Frailing said that just because injured workers return to work does not mean that they do not have a loss in terms of potential advancement, change of job, or effects on their personal life. Mr. Frailing indicated that historically, the permanent disability benefit was to address such losses. Mr. Frailing introduced Margaret Carney, an injured worker.

*California Applicants' Attorneys Association - Margaret Carney, injured worker*

Ms. Carney stated that she was an operating room nurse and that a disk in her neck was injured on the job in 1993. She had physical therapy and went back to work in 1994 as a charge nurse, a job that was less physically demanding, but pays sixty-five percent of what she had earned before. In addition, she has had to hire other people to perform house and yard work that she formerly did herself at home.

Commissioner McLeod asked Ms. Carney if her case were litigated or if she had any problems. She responded that she got some correspondence about her claim that she did not understand and the return-to-work coordinator did not know either. Then she started receiving checks for permanent disability but did not get an explanation for them. At that point, she hired an attorney out of frustration and confusion.

*California Applicants' Attorneys Association - John Frailing, President (Part II)*

Mr. Frailing then related a case where he had a client -- a young man who was a baseball pitcher and suffered an injury to his pitching arm. While his physical limitation was minor -- the AMA guidelines would rate it at 1 or 2 percent -- and even though California's system takes into account more than that when evaluating his disability, he was compensated with less than $2,500 for a disability that cost him his career.

Mr. Frailing expressed his opinion that injuries with lower ratings were inadequately compensated in the California system. Three out of four injuries with permanent disability have ratings under 25% and half are under 15%. He referred to an Ontario study that showed that the lower rated injuries have affected the quality of the injured worker's life more than the larger rated injuries in relation to the compensation.

Mr. Frailing believes that the PDRS needs to be improved to get as many of the items of limitation into the schedule so that the parties will know what the factors of disability are. He predicts this will reduce litigation, reduce administrative costs and probably decrease the need for injured workers to get attorneys. Mr. Frailing also said that there needs to be uniformity throughout the state -- disability evaluators in one office will give a different rating than an evaluator in another office.

Mr. Frailing referred to graphs which were part of the written material he submitted for the hearing and stated that one could see that there has been a significant reduction in the cost of the system. He said that $3 billion has been saved since 1993 and half of the savings were to supposed to go to injured workers and half to employers, but the workers are not getting their share.

Chairman Rankin asked Mr. Frailing if a better guideline exists or if California would have to develop a new one. Mr. Frailing replied that in his opinion there are bits and pieces of different guidelines, including the AMA guides, that could be revised to come up with something to fit the purposes of what we are trying to do in California.

Commissioner Vach said that from his perspective, there is a built in conflict because higher permanent disability rates result in higher attorney fees. He asked, in a revised system, if Mr. Frailing would be willing to separate attorney fees from the permanent disability. Mr. Frailing responded that the dialog is open but attorneys, like anyone else, need to be paid for their work. Currently, if an applicant's attorney loses a case, he or she does not get paid. But if applicant attorneys would get paid, win or lose, the same as defense attorneys, the options are open.

Commissioner Vach stated that he would like to think that an injured worker is rated on his or her own disability rather than on the ability of an attorney to select doctors who will report optimizing the disability. He said that we are looking for an objective, repeatable disability standard, not something subject to litigation and advantageous selection. Mr. Frailing said that it was one of the reasons that the system went to Agreed Medical Examiners (AME) as the preferred method of evaluating injured workers.

Commissioner Vach stated that he finds that most litigation in the system revolves around permanent disability and asked if there were a way to get injured workers the benefits they are entitled to without so much litigation. Since the complexities in the current system may drive injured workers to retain attorneys, Commissioner Vach thought that the Commission should look at the whole system.

Mr. Frailing said that he had been looking at this issue for the past couple of months in preparation for this hearing and he has not seen any system that is working real well. Mr. Frailing recommends that the Commission retain what is good from the current system; before it is thrown out, make sure that there is a good alternative.

Commissioner Steinberg thanked Mr. Frailing, Dr. Capen, Ms. Murray and Ms. Carney for their testimony.

(Please Note: The California Applicants' Attorneys Association also submitted several documents, which are included as attachments. A listing of those documents may be found on the last page of these minutes.)

*Lunch Break*

At 12 noon, the Commission took a break for lunch. The hearing was reconvened at 1:05 pm.

*American Insurance Association - Bruce C. Wood, Senior Counsel*

Mr. Wood said that the American Insurance Association was very pleased that the Commission is undertaking this issue and urged that it continue an in-depth review of permanent partial disability (PPD) that fully ventilates the public policy issues. He said that he agreed with DWC Administrative Director Casey L. Young with respect to the twin goals of greater consistency and predictability and more efficient administration.

Mr. Wood's testimony was the same as his written statement submitted to the Commission, which is attached.

In summary, Mr. Wood said that PPD is critical to the performance of a state's workers' compensation system, is responsible for a major share of benefit expenditures and yet is one of the least understood aspects. The design of a PPD system raises other benefit delivery system issues such as incentives for additional medical treatment and expenditures, increased duration of temporary disability benefits, litigation of disputes, utilization and duration of rehabilitation benefits, and return to work incentives.

Mr. Wood said that California ranks first among all states in frequency of PPD claims according to the NCCI and between second and sixth highest of all the states in terms of cost because of PPD according to the Workers' Compensation Research Institute.

Mr. Wood stated that there never has been consensus in the workers' compensation community about the precise purpose and form of PPD benefits. In a general sense, PPD benefits are intended to provide compensation for a worker who does not make a complete medical recovery but who is not totally disabled in either a physical or economic sense.

Mr. Wood said that AIA does not advocate any one approach to PPD, but it does recommend several approaches that can help control costs while preserving fair protections for injured workers. AIA recommends that a compensation formula based on impairment be regarded legally as a "proxy" for disability, that PPD should not extend to conditions that have not caused permanent impairment, that California should consider using a grid approach, that there should be impairment with wage loss for severe injury, that the AMA Guides or similar objective guides be used, and that only one benefit tier should be employed.

Chairman Rankin asked Mr. Wood if he had calculated the impact on California benefits if the AMA Guides instead of the PDRS were used. Mr. Wood said that he had not. Commissioner Vach asked if there are any states that require a computer to determine the permanent disability rating. Mr. Wood replied that he had not heard of such a thing.

Commissioner O'Hara remarked that most of the testimony that he has heard before the Commission was how bad the California system was and that he often thought that the problems in California may be with the insurers. He added that perhaps it is not the worst system but the best for the injured worker.

Commissioner Steinberg asked Mr. Wood to clarify the AIA's position on the use of the AMA Guides and how the guides should be used as a proxy for disability -- are they a complete substitute for disability of just a basis for getting to the disability ratings? Mr. Wood replied that in some systems it is both. He recommended that California take a look at how other states use them.

Commissioner Steinberg thanked Mr. Wood for his testimony and introduced Charles Bader of the Californians for Compensation Reform.

*Californians for Compensation Reform - Charles Bader, Executive Director*

Mr. Bader commended the Commission for its draft permanent disability study outline and said that he was impressed with its comprehensive approach. He thanked Commissioner Steinberg, the 1995 Chair of the Commission, for his even-handed approach and said that he was looking forward to working with Chairman

Rankin this year. He said that he had three main points that he wanted to make and then he would introduce other people who will also testify.

Mr. Bader stated that he hoped the Commission would draw clear distinctions among the concepts of impairment measurement, disability rating, and benefit level. CCR believes that impairment measurements should be a medical function, based upon objective, scientifically reputable standards. His second point was to encourage the state to have the treating physician do the evaluation of impairment. Third, CCR recommends using the AMA Guides and having the DWC Administrative Director make any adjustments if necessary.

Mr. Bader stated further that the current system is very subjective, lends itself to disagreements and lawsuits, lacks reputability and leads to very dissimilar results. He referred to a 1988 article in the medical journal Spine, where 65 medical examiners evaluated a hypothetical patient and the disability ratings ranged from zero to seventy percent. He hopes that the Commission, in the course of its study, will compare the money going to legal fees and litigation to the amount of money going to injured workers.

Mr. Bader then introduced four colleagues to speak on behalf of the Californians for Compensation Reform.

*Californians for Compensation Reform - Bob Canning, Specialist in Managed Workers' Compensation for Pacific Bell*

Mr. Canning is employed by Pacific Bell, a permissively self-insured employer, in the Workers' Compensation Claims Department. He noted that Pacific Bell's workers' compensation costs totalled $36 million in 1995. The payments escalated $5 million from 1994 to 1995 even with a reduction in medical payments and twenty-five percent fewer lost workdays. Mr. Canning has over twenty years experience in workers' compensation claims and administration and for the last fifteen years has been an instructor for the Insurance Educational Association teaching basic and advanced permanent disability rating.

Mr. Canning said that he had three major points to make. His first comment was that the present PD rating structure is very confusing, does not address the employee's ability to work, and it doesn't address their impairments. Second, there is no consistency in the ratings. Third, the present system seems to encourage litigation and delays in providing benefits rather than encouraging the timely provision of benefits.

Commissioner Steinberg asked Mr. Canning to what did he attribute the large increase in Pacific Bell's workers' compensation costs. Mr. Canning replied that the total number of claims is consistent at about 3,600 per year, that most of the dollar increase had to do with permanent disability and paying applicant's attorneys' fees on permanent disability and Compromise and Release awards, and that some is attributable to the increase in the temporary disability rate.

*Californians for Compensation Reform - David Caine, Southern California Edison and President of the California Self-Insurers Association*

Mr. Caine said he applauds the Commission for undertaking what he believes is one of the most important steps that will affect California's future. He wanted to underscore that of all the reforms that may occur legislatively, what the Commission is doing may the most important of all -- bringing stability and equity to the evaluation of injured workers.

Mr. Caine said that he believes that a fundamental overhaul of the current rating system is essential and concurs that today's system is inconsistent, confusing, and at best generates only substantial revenue to the attorneys and forensic physicians at the expense of the injured worker.

Mr. Caine believes that medically-verifiable norms and reliable measurement of actual loss of function are the methods by which to report disability. Subjective pain is one of the biggest problems in the system right now because it is not scientifically replicable for objective determination of actual impairment. Before any compensation is allowed, there should be a method of validate subjective pain and equate it to job functional loss.

Mr. Caine thinks one of the biggest changes that occurred in the rating schedule is the advent of the guidelines for work capacity. The guidelines were structured around 1970 and he believes that they are completely obsolete and should be eliminated. He agrees with Mr. Young that the guidelines are outdated, outmoded, and do not fit an appropriate impairment schedule.

The guidelines for work capacity are used often for prophylactic restriction -- simply a restriction that says a precaution is in order. A prophylactic restriction does not mean that there is an impairment; it's simply someone saying that one should avoid a certain activity. He feels that prophylactic restrictions are used in what he terms a disguised attempt to manipulate the workplace and to deal with personnel actions. For example, Mr. Caine believes a restriction stating "May not work with Supervisor X or the claimant may not work overtime or Saturdays" is outside the scope of conventional medicine and not appropriate for describing disability or

impairment. Mr. Caine said they are asking for documentation as to the reason for any prophylactic restriction as part of an objective, measurable and replicable assessment of disability.

Mr. Caine believes that the AMA Guidelines is a beginning of an evaluation of permanent impairment that is consistently understood and utilized in thirty other states. It's not a perfect fit, but it is in the right direction.

Mr. Caine described the situation where a laborer may have a restriction to light work which may result in rehabilitation and training in another area such as computer information skills. He said that this worker may become more marketable, more skilled and have a greater income and that he or she would receive a substantial permanent disability award in addition to this very expensive training. He does not think that the system should be designed that way. Mr. Caine expressed the belief that the disability rating should be performed after the injured worker has rehabilitation.

He also asked that what he termed a structural flaw in the system be eliminated. Mr. Caine said that the current system allowed an interpretation so that the occupational variant can be based on an activity outside the usual and customary work of the employee. This can result in a higher rating than one based on the actual job the employee was holding at the time of the injury. Mr. Caine contended that this was a manipulative technique to drive up the cost of the permanent disability award.

The final point that Mr. Caine wanted to make was that multiple disability ratings that exceed 100 percent do occur in California. He recalled one case of his years ago where the injured worker actually received 156 percent disability ratings when totalled up in the aggregate, yet never reached the point of a pension. In his mind, the AMA Guidelines would have compensated that worker better than the current system.

Mr. Caine believes that the current system needs rethinking and that it is obsolete and does not reflect accurately the challenges for tomorrow for the worker population in the competition California has to face.

Chairman Rankin noted that Mr. Caine's group was supporting a bill in the State Legislature that would pay all rehabilitation benefits out of permanent disability benefits. Chairman Rankin asked Mr. Caine how this would work given his contention that the disability ratings should take place after rehabilitation. Mr. Caine replied that every bill does not reflect his personal views but that he does believe that anything that will advocate a proper rating system should also consider

the rehabilitation program and the part that it plays in achieving the end goal of proper compensation for injured workers.

*Californians for Compensation Reform - Yvette Delucia, Claims Manager for Summit Perspectives Risk Management*

Ms. Delucia said that one of her tasks as claims manager is to do various sorts of research projects for her employer clients as they look to expand into other states. She has conducted various studies in the State of Texas with respect to workers' compensation benefits and litigation and has been invited to sit on the Texas Legislative Oversight Committee that had the task of reviewing the Texas 1989 reform laws and proposed addendums for future change. Ms. Delucia believes that the Texas system has some features which could be effectively replicated in California.

Ms. Delucia said that the impetus for the Texas reforms was the need for greater consistency and efficient administration. Before the reform, they used a unique Texas Schedule to rate the various injuries, including modifiers for age and occupation as well as subjective complaints. Texas now utilizes the Third Edition of the AMA Guidelines to determine an impairment rating. By using the Third Edition, they do not rate subjective complaint factors at this time; however, they have built modifiers in to account for neurological sensation, but they do not weigh it as heavily as they do the objective findings. The Texas Oversight Committee has proposed an additional reform step called the Texas Impairment Study or TIS.

Ms. Delucia stated that she had a report to share with the Commission that shows that litigation in Texas has decreased over 80 percent since the reform. The current litigation is only for bad faith claims handling and there is no legal representation on 99 percent of the workers' compensation cases. Before the reform, Texas' litigation ratio was almost the same as California' current litigation rate -- over 40 percent on a statewide basis.

Chairman Rankin asked Ms. Delucia what happened to the workers' compensation benefits in Texas since the reform. Ms. Delucia replied there has been a 40 percent increase in the benefit rate. Commissioner O'Hara asked Ms. Delucia for some statistics on the total benefits paid out and she said that she would provide that data to the Commission.

*Californians for Compensation Reform - Larry Howard, Safety and Environmental Compliance Manager for Basic Vegetable Products*

Based on his experience with the current permanent disability rating system, Mr. Howard considers it to be the root cause of most of the problems and abuse in the system for both employees and employers. He said that the current system was subjective and litigious, and that in his opinion, it should be objective and non-adversarial. He stated that there is little or no credibility to a rating system that encourages the use of lawyers to make medical interpretation.

Mr. Howard stated that the current system does not focus on impairment as he contends it should. As an employer, he said he has been faced many times with the situation where he very much wants to bring an employee back to work at a permanently-modified job that will benefit both the employer and the injured employee. However, the way the existing medical reports have to be done, it is difficult to design or find a job that fits into that report and into that category and also at the same time comply with state and federal law such as the ADA and the 132-A requirements. He said that employees may then find themselves returning to work, but not a job they want to be or are physically capable of doing.

Previous efforts in reforming the California workers' compensation system have, in Mr. Howard's experience, been somewhat successful for both the employer and the employee, particularly the revisions allowing a shorter rehabilitation process. However in his opinion, these reforms have been first aid on a seriously ill system. Mr. Howard said that the cure for the system is to have sound, reputable, objective standards to measure impairment and determine appropriate permanent disability compensation.

Mr. Howard stated that from his perspective as an employer, he is not asking for an across-the-board reduction in benefits to legitimately-disabled employees. Seriously legitimately-injured employees in many cases deserve a higher permanent disability benefit than what they are receiving, but he contends that many permanent disability awards are being made for non-legitimate injuries as a direct result of the current permanent disability rating system.

Mr. Howard urged the Commission to make a serious, comprehensive review of the permanent disability rating system and make the changes necessary to return the system's objectivity, consistency, and fairness.

Chairman Rankin asked Mr. Howard for an example of a non-legitimate injury. Mr. Howard replied that there are injuries where, under the permanent disability rating system and the evaluation guidelines that doctors have to follow, an employee can very easily exaggerate certain symptoms and come up with a high

evaluation; if it is the intent of the employee to do that, it can be done. Mr. Howard said that the AMA Guides may be a good start to eliminate some of that.

Commissioner Steinberg thanked Mr. Bader, Mr. Canning, Mr. Caine, Ms. Delucia, and Mr. Howard for their remarks and called upon Ed Woodward, President of the California Workers' Compensation Institute.

*California Workers' Compensation Institute - Edward C. Woodward, President*

Mr. Woodward said that after listening to the other testimony, he could sum up by saying "me too". He remarked that there seems to be a lot of concern about the philosophical underpinnings and the purpose of the benefit. Mr. Woodward said that when the system was first being developed, the originators looked at three components: the readjustment period or the time it would take for the worker to get back into the labor market, the impact on future earnings or the ability to compete, and a personal loss component to address other problems the worker would have due to the injury. There was not one clear-cut single purpose.

Mr. Woodward said that it was important to distinguish among impairment, disability, and benefits. He said that impairment is a substantial loss or limitation due to the injury, which generally speaking takes a medical doctor to determine. Impairment may then be translated into disability. Mr. Woodward believes that a good thing in the California system is that it considers age and occupation as factors in the translation from impairment to disability. From the disability rating, the benefit is determined and the level of benefit for the various disability ratings is a policy decision.

Mr. Woodward said that Mr. Payne would discuss the problems with the wide variations in the impairment ratings.

*California Workers' Compensation Institute - Doug Payne, Fremont Insurance Company*

Mr. Payne said that when he started in the business in the late 1960s, the permanent disability rating schedule did not contain work guidelines and restrictions. The schedule contained only three possible ratings for a back: slight at 30 percent, moderate at 50 percent and severe at 100 percent.

So the Rating Bureau (now the Disability Evaluation Unit) internally developed some guidelines that they used to interpret among those three ratings. Those were the original work restrictions that were finally promulgated in 1970 and adopted as

part of the schedule. The PDRS described work impairments in terms of lifting, bending, stooping, heavy work, sedentary work, level of subjective complaints and the rated intervals range from 10 percent up to 100 percent. Shortly after that, Mr. Payne said the guidelines were extended by traditional decisions to the lower extremities, even though they have little application to the lower extremities in some instances. For example, stooping and bending activities have little to do with an ankle joint.

Mr. Payne said that under the schedule before the inclusion of the guidelines, a routine knee surgery would rate around a seven to ten percent disability. After the application of the guidelines to the lower extremities, the same injury might rate anywhere from seven to over fifty percent, depending upon what terminology the doctor used. That situation led to a significant increase in "dueling docs" and in the solicitation of medical-legal opinions and that in turn had a significant impact in driving up the numbers of applications and litigations overall in the system.

Commissioner Steinberg asked how a knee rates at fifty percent. Mr. Payne replied that can occur if the individual is limited to light work, since light work carries a standard fifty percent rating. The work restriction was originally intended to describe a back, but it has full applicability to the knee per the Becker case in 1976.

Mr. Payne related that in the ensuing years, there were attempts to extend the guidelines to the upper extremities but the WCAB and the courts consistently refused to apply them. But doctors began describing unratable factors, primarily dealing with repetitive motion activities and repetitive strength activities, not in the schedule for the upper extremities. Ratings determined from those medical reports could vary all over the map and the same report given to different disability evaluators would produce widely different ratings.

Two years ago, proposed upper extremity guidelines and revisions to the back and lower extremity guidelines were issued to the workers' compensation community and almost immediately the new terminology and those proposed restrictions started showing up in the medical reports, creating a major rating problem. The proposed guidelines were used by some of the disability evaluators even though they had not been adopted, and other disability evaluators refused to use them. Some doctors started using the new terminology and others did not. The DWC Administrative Director then issued a letter to the disability evaluators and to the community instructing that the proposed guidelines not be used until they were formally adopted into the PDRS. However, Mr. Payne said that some of the disability evaluators were still using the proposed guidelines and that some physicians are still using the new proposed terminology.

Mr. Payne said that he was familiar with several applicant attorneys who are certified workers' compensation specialists who won't settle a case unless they get an outside rating evaluation. He said that they now have to get agreed rating experts along with agreed medical specialists, or cases are not settled. Without such agreement, the attorneys insist that the case goes to a DEU rating and possibly to trial. He said the problem of dueling rating experts makes claims very difficult to settle, to manage and to establish reserves.

Mr. Payne said that the reform acts of 1989 and 1993 created new category called QME and in 1993 gave great weight to the opinion of the treating doctor on the issue of permanent disability. There are now literally thousands of doctors writing permanent disability reports who are not familiar with the legal impact of the exact language they are using.

Mr. Payne thinks that permanent disability rating schedule had for years failed to achieve its original purpose, which was to help produce predictable, consistent and substantial justice. He believes that the schedule now goes much further in increasing uncertainty and litigation than it does to minimize it.

Commissioner Vach pointed out that insurers have to issue advances against permanent disability even though the case has not been rated. The DEU may then come in with a higher rating and because of that there may be mistrust that the employer is out to cheat the employee. Mr. Payne said that situation had come up but there was also a case where the insurer had advanced in excess of $20,000 and the rating came in under $10,000 so the insurer was out about $12,000. Mr. Payne added that if the insurers do not make advances up to an appropriate level, the DWC Audit Unit can impose penalties and then the insurer must make up those advances along with penalty payments.

Chairman Rankin asked if the solution would be to get a quick rating from the Disability Evaluator. Mr. Payne replied that until recently, getting an informal rating from the DEU was a matter of months or years. Mr. Payne said that he was advised that the informal rating backlog has been eliminated and that informal ratings should now be issued in the mandated time frame.

Commissioner Vach asked what the difficulty was getting a consistent rating out of a physician's report. Mr. Payne responded that the last page of the doctor's report discusses the factors of disability and the evaluators will rate off of that. But in the body of the report, other language may be used which may be inconsistent. For example, the report may say "no heavy work" which rates at 30 percent and "limited to light work" which rates at 50 percent.

Commissioner Alvarado asked if there have been any studies testing the AMA Guidelines by sending out a medical report to sixty different Agreed Medical Examiners and comparing their answers. Mr. Payne replied that he was not aware of any. Commissioner Alvarado asked if the AMA Guidelines were implemented, would that be the answer to vague medical examiner language. Mr. Payne responded that he did not think the AMA Guides could be adopted wholesale and that they would need to be modified for workers' compensation.

Commissioner Vach asked if the emergence of independent disability raters stemmed from the inability to get ratings out of the DEU. Mr. Payne replied that he thought that was the primary reason for their development.

Mr. Woodward added that the current system is problematic and that anything the Commission can do to help will be time and money well spent. He also wanted to advise the DWC Administrative Director that CWCI would like to see him adopt the proposed changes in the age and occupational variants but does not support the proposed rating changes for upper extremities.

*Independent Business Coalition, Inc. - Thomas E. Hagerman*

Mr. Hagerman prefaced his remarks by saying that employers should not have to know such a complicated program and to counsel their employees.

Mr. Hagerman said that his presentation was based on data he acquired from the WCIRB when he was part of the reform process in 1993. He referred to a report entitled "Subjectives and the Minor Injury - The 'Key' to Workers' Comp Cost Reduction" which he submitted as part of his testimony to the Commission.

Mr. Hagerman explained that "minor" injuries are those rated at 24 percent and below and "major" injuries are those that are rated 25 percent or more. He also designated as "subjective" injuries all sprains, strains, cumulative injury, mental disorders and psychiatric -- the kinds of injuries that require little or no objective evidence for a PPD award and are the most difficult to rate using the current PDRS. He pointed out on the third page of the report that minor subjective injuries accounted for 29% of the cost and that major subjective injuries resulted in 19% of the total cost. Mr. Hagerman said that these figures speak to the importance of controlling subjectives in the system.

On the fourth page of the report is a chart showing the total estimated minor subjective costs. Mr. Hagerman explained that experience demonstrates that a significant portion of the cost of minor objective injuries is related to subjective complaints of residual pain. He has therefore estimated that the subjective

component of minor objective injury accounts for roughly 25% of the value of the reserve. When the costs of the minor subjective injuries and the costs of the subjective components of the minor objective injuries are totalled, they comprise one third of the workers' compensation costs.

Mr. Hagerman's analysis indicates that low minor injuries (rated from 1% to 14%) cost an average of $14,145 per claim while high minor injures (rated from 15% to 24%) cost an average of $27,785 per claim. Mr. Hagerman also took a look at strains, which he said really amounts to sore muscles, and determined that the average cost of a low minor strain claim was $15,634 and a high minor strain claim was $32,531. He pointed out that this analysis was based on 1990 data, before the fraud spike.

Mr. Hagerman said that this is part of the reason that California workers' compensation system is such a problem for industry and those kinds of wild card costs have been the primary reason why so many jobs have left the state.

Chairman Rankin asked Mr. Hagerman what he meant by the "fraud spike". Mr. Hagerman responded that in 1991 and into 1992 the workers' compensation premiums spiked in California, driven by a sharp rise in incurred losses for insurance companies by thousands of claims filed by what were called medical mills. Chairman Rankin asked how much of Mr. Hagerman's data is attributable to the medical mills. Mr. Hagerman replied that the 1990 data was minimally affected, and that medical mills hit the data hard in 1991 and 1992. Chairman Rankin commented that he had heard that the medical mills were a problem even earlier and that is why the Legislature passed the Presley bill dealing with fraud in 1991.

Commissioner Steinberg thanked Mr. Hagerman and called upon Robert Sniderman of the California Association of Rehabilitation and Reemployment Professionals.

*California Association of Rehabilitation and Reemployment Professionals - Robert Sniderman, President*

Mr. Sniderman said that he represented the people in California who work with injured workers in an endeavor to return them to work. With this in mind, he takes a slightly different approach to the permanent disability system than impairment and ratings.

Mr. Sniderman stated that one of the aspects of the Americans with Disabilities Act (ADA) is to hold the relationship of the employer and the employee as sacred, which has thus far been lost in the workers' compensation system.

Although the ADA has little to do with workers' compensation, Mr. Sniderman suggested that the concept of functional capacity and how the individual will be able to interact with his or her environment after the injury may be helpful.

Mr. Sniderman stated that the current system talks about loss of earning capacity in terms of what an injured worker did before the injury. However in the business climate that California is in now, jobs that existed a few years ago may not even exist now. Yet if we look at what the injured worker is going to do in the future, we can evaluate his or her functional capacity to do the job and know the wage.

Mr. Sniderman believes that functional capacity assessments in combination with medical doctors' impairment reports can combine to give some information that will be useful to make rates. He referred to his written testimony (attached) to provide a more detailed discussion.

In response to questions from Commissioner Vach, Mr. Sniderman said that since the 1994 reforms, he is starting to see a greater return to modified or alternative work with the same employer than he ever has before. Mr. Sniderman said that with a fully integrated system, with return to work as an integral process, rehabilitation professionals could be asked by employers to do essential functional job analyses and ergonomic assessments, and assist in modifying jobs and controlling costs.

Commissioner Vach asked if Mr. Sniderman anticipated any problems with doctors accepting the results of functional capacity testing without actually having witnessed the testing. Mr. Sniderman replied that functional capacity assessment and work tolerance testing are objective measurements done with standard tests under controlled conditions and very difficult to fake. He said that with an educational program on what goes into a functional capacity assessment and how to interpret a report, the medical community can use functional capacity assessment reports as a tool.

Commissioner Vach asked if Mr. Sniderman had seen cases where an injured worker was inappropriately in rehabilitation because of a high permanent disability rating. Mr. Sniderman replied that he has seen instances where an injured worker is in the system because he or she needs the benefits in order to live and there are no alternatives, but rarely if ever because of permanent disability.

Commissioner Steinberg thanked Mr. Sniderman and called on Mark Dakos and Dr. Randy SooHoo.

*Work Recovery, Inc. - Mark Dakos, President and E. Randolph SooHoo, M.D., Chief Medical Consultant for Social Security in southern Arizona and Assistant Professor and Medical Director for the Disability Assessment Research Center at the University of Arizona*

The testimony of Mark Dakos, President of Work Recovery, Inc., was the same as his written statement submitted to the Commission, which is attached.

In addition, Mr. Dakos remarked that he had been doing some consultative work with the state of New Mexico and announced that Robert Auerbach, the General Counsel for the New Mexico Workers' Compensation Administration, has volunteered his services on a consultative basis to the Commission so that the members may have a good understanding of how modifications have improved the New Mexico system.

Mr. Dakos also stated that he does not advocate elimination of due process for the employee and the employer or the elimination of judicial discretion. He said these exist to take care of the exceptions.

Dr. SooHoo stated that from his experience he has determined that the responsibilities of physicians into two areas -- medical and administration. The medical aspect is very straightforward but the administrative component has created problems, which result from the lack of continuity and consistency in evaluations.

Dr. SooHoo recommends a combined functional capacity and impairment rating system with objective, unbiased and standardized measurement methods in both areas that can accurately determine the individual's disability status. The technology-based functional assessment system would offer impairment evaluation protocols for almost every medical condition and should be standardized. All ranges of motion should have some sort of a pictorial example to direct the examiner to the proper methodology for the placement of an interface device that would report the real time measurements on an accurate and reproducible basis. Dr. SooHoo said that the data obtained should be directly comparable to job titles as defined by the US Department of Labor, Division of Occupational Titles.

Dr. SooHoo stated that technology-based systems would provide more complete and accurate assessment or basis for the physician to offer an opinion. Objective and reproducible data will support physicians in making their conclusions and may decrease some of the differences in opinion.

Dr. SooHoo gave a demonstration of a system on a laptop computer to the Commission members.

*Association of California Insurance Companies - Douglas Widtfeldt, Vice President*

Douglas Widtfeldt, Vice President of the Association of California Insurance Companies referred to his written statement (attached). He also recommended that , if the decision is made to go forward with the study of permanent disability system, the Commission consider engaging the services of an independent research organization with a reputation and capability of conducting objective studies. Mr. Widtfeldt said that it was important to raise this issue above the politics that are inherently associated with it.

*Hearing Wrap-Up*

Commissioner Steinberg thanked Mr. Widtfeldt and all the presenters for their testimony. He reiterated that the purpose of the hearing was to hear from the workers' compensation community at large and get some ideas of the problems as they see them. The Commission will make a decision in the future as how to advance the dialogue on permanent disability, through an independent study or some other way.

Commissioner Steinberg asked Executive Officer Christine Baker about the process for contracting for a study, should the Commission decide on that course. Ms. Baker replied that following the State Administrative Manual requirements, the Commission would issue a Request for Proposal (RFP) by April 1, 1996 and go through the various steps including a bidders' conference, submission of proposals, oral presentations by bidders if necessary, and public opening of bids, and the awarding of the contract by June 17, 1996. Commissioner Steinberg asked Ms. Baker to prepare a draft RFP for review by the Commission at its March 14, 1996 meeting.

***Remarks by the Outgoing 1995 Commission Chairman***

Commissioner Steinberg thanked Christine Baker and the Commission staff for the assistance given him during the past year. Ms. Baker replied that it was an honor for her and the staff to serve in that capacity.

***Presentation of Certificate of Appreciation to Robert B. Steinberg***

Chairman Rankin presented Commissioner Steinberg with a Certificate of Appreciation signed by the Commissioners and thanked him for his diligent service and gracious manner in chairing this Commission during the past year.

*Future Meetings*

The March 1996 meeting of the Commission will be held on Thursday, March 14, 1996 at 10 am in the first floor auditorium in the Employment Development Department at 722 Capitol Mall in Sacramento.

On April 18-19, 1996, the Commission will present an educational conference entitled "Challenges in California Workers' Compensation: A Symposium" at the Hyatt Regency Hotel at 5 Embarcadero Center in San Francisco.

*Adjournment*

A motion to adjourn the meeting was made by Commissioner McLeod, seconded by Commissioner O'Hara and passed unanimously. The meeting was adjourned at 5:10 pm by Commissioner Steinberg.

Attachments:

Meeting agenda

Listing of and Written testimony submitted by:

American Insurance Association
Association of American Insurance Companies
California Applicants' Attorneys Association
California Association of Rehabilitation and Reemployment Professionals
California Self-Insurers Association
California Vocational Evaluation and Work Adjustment Association
Coalition of California Insurance Companies
Independent Business Coalition
National Steel and Shipbuilding Company
Work Recovery, Inc.

Approved: Respectfully submitted,

Tom Rankin 3/13/96 Christine Baker

Tom Rankin, Chairman CR Date Christine Baker, Executive Officer